

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES AND ENERGY
IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE BOARD)
ORDER TO SHOW CAUSE RE:)
POTENTIAL PATTERN OF VIOLATIONS,) DOCKET NO. 92-041
INCLUDING NOTICES OF VIOLATION)
N91-35-1-1 AND N91-26-7-2 (#2),) CAUSE NO. ACT/015/025
CO-OP MINING COMPANY, BEAR CANYON)
MINE, ACT/015/025, EMERY COUNTY,)
UTAH.)
_____)

ON WEDNESDAY, MARCH 24, 1993, COMMENCING AT THE
HOUR OF 10:00 A.M., A HEARING WAS HELD IN THE ABOVE MATTER
BEFORE THE BOARD OF OIL, GAS AND MINING, 355 WEST NORTH
TEMPLE, 3 TRIAD CENTER, SUITE 520, SALT LAKE CITY, UTAH
84180-1203.

5980 South 300 East • Murray, Utah 84107

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LINDA J. SMURTHWAITE, CSR, RPR

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APPEARANCES

CHAIRMAN: JAMES W. CARTER

BOARD MEMBERS: RAYMOND MURRAY
JUDY F. LEVER
DAVE D. LAURISKI
THOMAS FADDIES
JAY CHRISTENSEN
KENT STRINGHAM

STAFF MEMBERS:

JANICE L. BROWN, Secretary of the Board
LYNDA S. JENSON, Secretary
THOMAS A. MITCHELL, Assistant Attorney General
RONALD J. FIRTH, Associate Director of Oil and Gas,
Division of Oil, Gas and Mining
LOWELL P. BRAXTON, Associate Director of Mining,
Division of Oil, Gas and Mining
FRANK R. MATTHEWS, Petroleum Engineer
BRAD G. HILL, Geologist

BUREAU OF LAND MANAGEMENT:

ASSAD N. RAFFOUL, Petroleum Engineer

FOR CO-OP MINING: CARL KINGSTON, ESQ.

1 SALT LAKE CITY, UTAH, MARCH 24, 1993

2 MR. CARTER: The first item on the agenda is: Now
3 is the time and place for hearing in Docket No. 92-041,
4 Cause No. ACT/015/025 -- In the matter of the Board
5 Order to Show Cause Re: Potential pattern of
6 violations, including notices of violation N91-35-1-1,
7 and N91-26-7-2, part 2, Co-op Mining Company, Bear
8 Canyon Mine, ACT/015/025 Emery County, Utah.

9 As noted in the agenda, this matter was continued
10 from our February 24th hearing. We have Mr. Carl
11 Kingston appearing for the respondents, and Tom Mitchell
12 appearing for the Division.

13 We understand there's an order you are requesting
14 the Board enter at this point.

15 MR. KINGSTON: That's correct.

16 MR. MITCHELL: That's correct. Do you want me to --

17 MR. KINGSTON: Go ahead, Tom.

18 MR. MITCHELL: Mr. Chairman, members of the Board,
19 you have pending in front of you a motion, joint motion
20 for dismissal. Essentially the grounds for the
21 dismissal are concern that an application of the statute
22 and rules has been requested by the Division at this
23 point would be essentially too mechanistic an approach,
24 given the approach that OSM has taken.

25 I've been able to locate, since our last hearing,

1 only three decisions in the history of the Coal Act
2 dealing with patterns. Two of the three, the Office of
3 Hearing Appeals and the Department of Interior have
4 determined a pattern of violations revocation shall not
5 take place. And the only instance in which they have
6 determined that that suspension should take place, Co-op
7 operator default, did not appear to contest it.

8 The rules and statutes are essentially similar or
9 the same between the State of Utah's program and the
10 Federal Program. However, the Office of Surface Mining
11 has a directive and a policy in place and -- at least
12 they have had in place at the time of these two matters
13 -- one was OSM versus RWR Development, and Debcon Coal
14 Company. That was a 1991 case in front of an ALJ. And
15 the other was an ALJ decision in 1989, Chestnut Coal
16 versus OSM.

17 Although ALJ decisions are determined within the
18 interior system to not have precedential value, the fact
19 that they did rely upon those OSM policies and
20 directives, and even though we have no similar policy or
21 directive, led us to believe if we were to meet our
22 burden of showing not only a pattern, but that there was
23 prima facia basis for revocation and suspension, and we
24 were to apply or not to apply the same sort of criteria
25 that OSM has applied, same or similar situations, we

1 would be asking this Board to treat these people in a
2 more stringent fashion than the federal program. Sort
3 of, to boil it down to a nutshell in terms of what this
4 criteria looks at, they say even if you have a pattern,
5 how will a suspension or revocation now address the
6 environmental concerns?

7 And the Division, in looking at its evidence,
8 determined that suspension or revocation now, if we were
9 to apply that criteria, would in no way provide a net
10 gain of any sort environmentally at that mine site.

11 Because of the distance in time, from the time of
12 the pattern to where we are now, the issue of, is there
13 any ongoing or outstanding environmental damage at this
14 time, it's a remedy that would not improve the
15 environment. And in looking at this OSM material, leads
16 us to believe that it's not intended to be punitive,
17 it's intended to be remedial. And if that's the issue,
18 then we don't believe that it would be appropriate for
19 us to pursue it.

20 MR. CARTER: Mr. Kingston, do you want to add
21 anything?

22 MR. KINGSTON: We concur, of course, in the analysis
23 of the Division and join in the motion.

24 MR. CARTER: All right. Let me note for the record
25 before the Board takes action on this, we have received

1 a letter on March 18th from Mr. Appel who, as you
2 recall, was representing a water users group that
3 successfully intervened in this matter, essentially
4 acquiescing, I suppose, in the motion to dismiss; not
5 requesting any further action by the Board, and
6 indicating that he wouldn't file any further responses
7 or pleadings.

8 So, having heard what Mr. Mitchell has to tell us,
9 are there any questions?

10 MR. LAURISKI: I have a point of clarification. The
11 Board has entered a decision on the issue of collateral
12 estoppel, and you have now filed a motion for request
13 for reconsideration of that decision. Does our
14 dismissing this case also dismiss your request for
15 reconsideration?

16 MR. KINGSTON: It would be our motion, it would --
17 it would terminate the entire proceeding.

18 MR. MITCHELL: That's our understanding.

19 MS. LEVER: And vacate the order that's --

20 MR. MITCHELL: No, vacate the request for
21 reconsideration.

22 MR. LAURISKI: There is no order.

23 MS. LEVER: It was based on another decision?

24 MR. MITCHELL: There is a previous collateral
25 estoppel decision by the Board that the motion for

1 reconsideration is withdrawn and vacated as part of the
2 dismissal of this whole matter, but the order, the order
3 still is the order.

4 MR. CARTER: That sort of hangs out there without
5 any --

6 MS. LEVER: Do we want to leave it hanging?

7 MR. MITCHELL: I don't think you have a structure
8 for addressing it at this time.

9 MR. CARTER: It seems to me it's no longer
10 material. It's interesting curiosity, but it no longer
11 has any relevance.

12 MR. MITCHELL: No bearing on Co-op, on the parties.

13 MS. LEVER: Or any other party looking to it?

14 MR. MITCHELL: Well, as regards the issue of
15 collateral estoppel, it has precedential effect for this
16 Board, as regards the ultimate issue of this operator
17 and a question of a pattern or a question of basis for
18 that.

19 MS. LEVER: I understand it has no effect on the
20 ultimate result that would be dismissed. My concern is
21 we might have, absent your joint dismissal, have been
22 willing to grant that reconsideration to reconsider the
23 order, which would --

24 MR. CARTER: That would really turn into an advisory
25 opinion.

1 MR. MITCHELL: That becomes an advisory opinion.

2 MR. CARTER: It seems to me if a similar issue comes
3 to us, let's say another operator in a different fact
4 circumstance, that determination would not be binding.

5 MR. MITCHELL: No.

6 MR. CARTER: The Board could revisit that and say
7 "We've looked at it again and our initial collateral
8 estoppel determination was in error."

9 MR. MITCHELL: Yes, it's persuasive, but I don't
10 think the Board is bound by it.

11 MR. CARTER: No.

12 MS. LEVER: I was wondering if we needed to weaken
13 any effect of that.

14 MR. MITCHELL: Right now you don't have anything
15 pending in front of you.

16 MR. CARTER: Other questions?

17 MR. CHRISTENSEN: Mr. Chairman, I intend to vote in
18 favor of this motion. However, I have an uneasy feeling
19 about what has gone on here. This matter has taken up a
20 great deal of Division time, and created expense and
21 taken up a great deal of Board time, and I sense, I
22 guess, that there is, or has been, a lack of knowledge
23 on the part of the operator about regulations, statutes,
24 or possibly a lack of desire or intent to comply with
25 regulations. And I would like to suggest that we

1 monitor this very closely for the next five or six
2 months, and have a report to the Board in our September
3 hearing to bring us up to date.

4 MR. MITCHELL: Can I respond? I understand your
5 concern, and I appreciate that. But I guess what I'd
6 say is, with the amount of effort that the Division has
7 put in to it, they made a determination as to a
8 particular point in time, and believe that that was
9 sufficient to constitute a pattern. But, the reason the
10 Division is dropping it now is because they're saying,
11 that's essentially irrelevant to where the operator is
12 now.

13 MR. CHRISTENSEN: Un-huh.

14 MR. MITCHELL: In terms of what the operator is
15 doing at the present as opposed to what was going on in
16 the past, that past should have no bearing upon the
17 present action now, because there is no need for
18 remedial action with this operator. This operator is --
19 there's no evidence to show if we were to do something
20 to them now, it would change anything. In other words,
21 we're satisfied with what the operator is doing right
22 now.

23 MR. CHRISTENSEN: I wasn't suggesting remedial
24 action, but maybe some sort of a monitoring effort, so
25 we don't do this again.

1 MR. MITCHELL: That goes on with every coal
2 operator. As you may know, the Division is required on
3 a periodic basis to track violations for every operator
4 to determine if a pattern exists, and that's just a
5 proforma sort of situation. If that arose, with regard
6 to this or any other operator, there's a mechanism in
7 place to monitor that. So I would be -- I guess what
8 I'm saying, I'd be concerned about asking this operator
9 to be distinguished from any other operator where
10 there's -- in terms of where they are presently, and
11 have a matter held open as though there's some sort of
12 present review process.

13 MR. CHRISTENSEN: I'm not saying that. I would -- I
14 think it would be -- make me more comfortable to have an
15 update or report along September.

16 MR. MITCHELL: Sure. I think the Board at any time
17 with regard to any operator can say, you know, how is
18 this operator doing, and we can certainly provide you
19 with that.

20 MR. CHRISTENSEN: Thank you.

21 MR. LAURISKI: I would make a motion we accept the
22 joint motion to dismiss this matter.

23 MS. LEVER: Second.

24 MR. CARTER: All right. It's been moved and
25 seconded. We grant the motion to dismiss. Is there any

1 further discussion? All those in favor, please say
2 aye? Any opposed? All right; the motion will be
3 granted.

4 MS. LEVER: I would like also to commend the two
5 parties, because while I'm sure it looks awkward, we
6 went through a large problem in coming to resolve this,
7 that we're dealing with new ground, and we appreciate
8 the fact that both of you were representing your parties
9 very well, and even though some of you had to make
10 changes in your positions in looking for it, I
11 appreciate you were willing to keep looking to get us to
12 the right solution as opposed to forging ahead perhaps
13 in more directions.

14 MR. MITCHELL: As near as we can determine, this is
15 the first time as to that, the state, as opposed to OSM,
16 has brought a pattern action, and so apparently by
17 necessity there was a certain amount of learning here,
18 and the Office of Surface Mining has brought three and
19 lost two in the last three years.

20 MR. KINGSTON: We were not particularly pleased to
21 be the guinea pigs, or the ones that had to break
22 ground, but we think we came to the right resolution,
23 and that's what we were striving to do ultimately.

24 MR. CARTER: Thank you both very much.

25 MR. KINGSTON: Thank you.

1 MR. MITCHELL: Thank you.
2 (Whereupon the matter was concluded.)
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STATE OF UTAH)

COUNTY OF SALT LAKE)

I, Linda J. Smurthwaite, Certified Shorthand Reporter, Registered Professional Reporter, and notary public within and for the county of Salt Lake, State of Utah do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision.

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In Witness Whereof, I have subscribed my name this 3rd day of April, 1993.

Linda J. Smurthwaite

LINDA J. SMURTHWAITE
CERTIFIED SHORTHAND REPORTER

